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ABSTRACT

The legal developments regarding dismissal of tenured faculty members because of financial exigency are considered. Attention is directed to, the ability of the public or private institution to dismiss and the constitution of a state of financial exigency and a bona fide dismissal. A standard for claiming financial exigency that was suggested by the American Association of University Professors (AAUP) in 1976 was that the institution would have to close if tenured faculty were not dismissed, and that other remedial measures must be instituted prior to dismissing tenured faculty. The courts have not adopted this AAUP "survival standard," rejecting the contention that capital assets need to be invaded to alleviate existing financial problems. The judicial definition allows an institution to take necessary measures to reduce financial hardship before the situation becomes irreversible. The financial hardship may be limited to a single department or a college of the institution. Once a governing body has declared that a state of financial exigency exists, the court will allow much deference to that discretionary decision in the absence of facts indicating a totally unreasonable or capricious decision. The courts have accepted the AAUP position that dismissals of tenured faculty due to financial exigency must be demonstrably bona fide. It is suggested that administrators need to have a working knowledge of the case law in this area; examples are cited. (SW)

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FINANCIAL EXIGENCY AND FACULTY DISMISSALS: GUIDELINES FOR UNIVERSITY ADMINISTRATORS

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ABSTRACT

Institutions of higher education are currently being placed into a state of financial exigency. Declining enrollments, reductions in federal and state budgets, as well as an overall decline in the economy have all contributed to this financial state of institutions of higher education. As a result, university administrators will face the dilemma of being forced to eliminate faculty positions, tenured as well as non-tenured.

The purpose of this paper is to make the administrator aware of the conditions judicially constituting a state of financial exigency, as well as subsequent steps necessary to actually terminate the position, allowing the faculty member his/her full due process rights. A thorough study of relevant cases dealing with faculty dismissals due to financial problems is presented. This case study approach results in a workable knowledge of the current judicial holdings with this serious problem. Effective administrative policies and guidelines will be developed based on a review of the relevant court cases and an analysis of the judicial constraints as set forth by these cases.

INTRODUCTION

Financial exigency, an extreme situation in which the financial problems facing an institution are so severe that dismissal of tenured faculty becomes necessary, is becoming an increasingly frequent problem facing higher education. The need to reduce and dismiss tenured faculty is a relatively new problem and most institutions lack experience for developing policies and procedures for faculty layoffs. Several interrelated factors contribute to circumstances leading to the serious state of financial exigency: a declining college-age population, a weak job market for college graduates, rising inflationary economic conditions with resulting decrease in financial support from both public and private sectors, and public demand from taxpayers for institutional accountability.

The growth of higher education during the late 1950's is frequently referred to as the "golden era" of American higher education. Enrollments during the past twenty-five years climbed to record levels. Foremost among the conditions that produced this growth was the population boom that doubled the college-age population during this time period, thus substantially increasing the demand for college-trained teachers. The expansionist economy during this time also created a market for college-educated individuals in all fields. In addition, the demand for equality of opportunity brought increased numbers of women, minorities, and disadvantaged to institutions of higher education.

Most administrators and faculty were not prepared for the more austere financial conditions that were to follow the so-called "golden era".

Administrators of institutions facing declining enrollments will be more likely to face the prospect of staff reduction and faculty dismissals once all other measures for budget reduction have been implemented.

Kirschling notes that higher education became a major industry in many communities. In a study of the financial condition of higher education in Indiana, he suggests that the fiscal impact of higher education is impressive.."a student budget of $5000 would suggest that the 230,000 students in Indiana represent over a $1 billion direct addition to the economy." Obviously, an enrollment decline of 25 percent or more as was projected for Indiana would have a significant financial impact on institutions, communities, and the state. The enrollment decline combined with higher operating costs due to inflation have placed many administrators in the unenviable position of developing retrenchment policies for cutbacks, including dismissal of tenured faculty.[1]

Many states use a formula for determining the number of projected faculty positions or full-time equivalent faculty(FTE). In a case study of Mankato State University in Minnesota, the formula used by the state legislature and the state university translates credit hours into projected faculty positions. For example, as stated by Alm, et al. in this case study, "a 19:1 student-faculty ratio at the undergraduate level is multiplied by student load factors to produce full-time equivalent(FTE) students and hence, the number of credit hours related to faculty positions."[2] Administrators of universities who are funded under credit hour formula basis then make staffing allocations for each department. However, no systematic plan exists for dismissal of faculty. Faculty dismissals, particularly tenured faculty, are considered only after other retrenchment policy efforts have failed to alleviate a financial crisis.

Leslie has observed the obvious relationship of enrollment levels to

the magnitude of government support, with "government parsimony" more in evidence when enrollments are declining. He also provides a breakdown of estimated sources of income for public and nonpublic institutions. Public institutions receive 13.4% from tuition and fees, 64.9% from government sources, 16.5% from sales and services, 2.6% from gifts, grants, contracts, and endowments, and 2.6% from other sources. In contrast, nonpublic institutions receive 36.7%, 21.2%, 23.4%, 14.8%, and 3.9% from those same sources, respectively.

Several reports in recent issues of the Chronicle of Higher Education provide evidence of recent financial crises facing universities and colleges. It can be expected that uncertain future financial planning will be even further compounded by the prospects of such proposed tax cuts or limitations as those that are being proposed in ten states. These curbs on government spending were inspired by the successful tax revolt in California(passage of Proposition 13 which substantially reduced property taxes). The tax revolt can be considered a reflection of public frustration over rising inflation. As a result of Proposition 13 in California, the college system, "in addition to an $18 million reduction in its original budget took a $14.1 million cut as its share of a $96.4 million statewide reduction ordered by the legislature. "[4]

The impact of inflation on financial appropriations for colleges and universities was apparent in 1979. Nine states failed to make any gain beyond the inflation rate and while, averaged nationwide, state support for higher education tripled for the past ten years, enrollments increased by only 42 percent.[5]

In 1979, Temple University in Pennslyvania had notified 21 tenured professors of their dismissals to be effective January, 1981, in accordance with guidelines of the American Association of University Professors (AAUP) stipulating that 18 months notice be given to tenured faculty. Letters to the notified faculty "cited declining enrollments and the need to maintain a

balanced budget as the reason for the layoffs." Faculty representatives expressed "anger and outrage" at the "offhand and confused" manner in which the administration conducted the layoffs.[6]

A budget cut of $13.5 million from the 1981-82 academic budget at Michigan State University created a deficit with 368 faculty, including 108 with tenure, facing loss of their positions. The institution's financial problems were largely due to a decrease in state funds caused by a decline in the auto industry. It was apparent that the legislature would give precedence to unemployed auto workers over higher education since the former is viewed as a necessity while the latter is perceived as a luxury.[7]

Wayne State University in Detroit Michigan planned to lay off approximately 600 nonacademic employees for an indefinite period in an effort to cover a $1 million deficit in 1981.[8]

In 1981, the University of Washington faced a loss of $33 million in its two-year operating budget and had declared a state of financial emergency for the first time in its history. The sudden and unexpected 10% cut in state appropriations prompted predictions that hundreds of faculty and staff members would face layoffs. Also in 1981, faculty jobs had already been eliminated at hard-pressed institutions in Idaho, Kentucky, Michigan, and Ohio, and layoffs of faculty members appeared imminent in Massachusetts.[9] In addition, due to a 4% budget cut, the University of Oregon had already taken formal steps for reduction of faculty. Portland State University declared a state of financial exigency in September, 1981 as a step toward the possible elimination of programs and jobs. Idaho's State Board of Education declared a state of financial exigency for all four of that state's four-year institutions. In Kentucky, the higher education appropriations of $394.5 million for the fiscal year was reduced by $26.1 million resulting in the possibility that layoffs of tenured faculty would have to be considered for 1982-83.[10]

The above examples of the severe financial circumstances facing many institutions of higher education point up the necessity for the development of adequate faculty dismissal guidelines. This paper will explore the legal developments decided by the courts when institutions of higher education dismiss tenured faculty members because of financial exigency. To be discussed are: (1) the ability of the institution, public and private, to dismiss tenured faculty due to financial exigency, (2) what constitutes a state of financial exigency, and (3) what is a bona fide dismissal. Finally, guidelines developed from this discussion will be proposed for the administrator when he/she is faced with the prospect of dismissing tenured faculty because of financial exigency.

ABILITY OF THE INSTITUTION TO DISMISS TENURED FACULTY BECAUSE OF FINANCIAL EXIGENCY

PRIVATE INSTITUTIONS

Tenure status is a legal entitlement to continuous employment terminable only for cause, disability, or financial exigency. The main purposes of tenure are to protect faculty members from unwarranted dismissals and to preserve academic freedom. [11]

> The real concern is with arbitrary or retaliatory dismissals based on an administrator's or trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting. If a professor had no protection against such actions, he might be deterred from pursuing his studies or his teaching in the paths that seem best. The tenure system,..., is designed to eliminate the chilling effect which the threat of discretionary dismissals casts over academic pursuits. [12]

The 1940 AAUP Statement of Principles on Academic Freedom explained tenure status as:

> a means to certain ends; specifically: (1) Freedom of teaching and research of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability.[13]

In private institutions of higher education, the tenure contract, relevant institutional documents, customs and usages of the academic community as a whole, and the practices of a particular institution itself govern the power of an institution to dismiss tenured faculty because of financial exigency. If the employment contract or an institutional policy specifically provides for financial exigency as a cause for dismissal of tenured faculty, those provisions will be upheld by the courts. In American Ass'n. Of Univ. Prof. v. Bloomfield,[14] a provision of the Faculty Handbook, which became part of the employment contract, stated, "A teacher will have tenure and his services may not be terminated, except... or under extraordinary circumstances because of financial exigency of the institution."[15] According to the court in Bloomfield, this explicit reference to financial exigency in the Handbook empowered the University to dismiss tenured faculty because of financial exigency.

In the absence of a specific reference to financial exigency as a cause for dismissal, the AAUP standards concerning tenure have been adopted by some institutions. The 1940 AAUP Standards state: "After the expiration of a probationary period, teachers... should be terminated only for adequate cause, except...under extraordinary circumstances because of financial exigency."[16] Incorporation of such a document into the employment contract allows the financial exigency clause to become part of that contract.[17] In Browzin v. Catholic University Of America,[18] the parties stipulated that the AAUP 1968 Regulations had been adopted as part of the contract between the plaintiff professor and the University. In reaching its decision, the Court of Appeals referred not only to the stipulated 1968 Regulations, but also to the 1925 AAUP Conference Statement and the 1940 AAUP Statement of Principles, both documents forming the basis for the 1968 Regulations.[19]

Where no direct or indirect reference to financial exigency is found in the tenure contract or other relevant documents, the courts have ruled that an institution can dismiss tenured faculty due to financial exigency because of the existence of a common academic practice.[20] In Krotkoff v. Goucher College,[21] the issue before the court was whether or not the tenure contract inherently allowed terminations due to financial exigency in the absence of such a provision in either the contract or other relevant documents. In holding that tenured faculty may be dismissed due to financial exigency, the Fourth Circuit in effect supported the idea of a common law in the academic community.[22] The court in Krotkoff stated, "The national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide."[23] To further support the idea of an academic community of understanding, the court referred to the 1940 Statement and further stated:

> A concept of tenure that permits dismissal based on financial exigency is consistent with the primary purpose of tenure. Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teachers. Hence, bona fide dismissals based on financial exigency do not threaten the values protected by tenure.[24]

The terms and conditions of an integrated tenure contract can also be determined from the practices of a particular institution.[25] In Perry v. Sinderman,[26] the court interpreted the tenure practices of a university by reviewing the past actions of the university. The court recognized the existence of a common law in a university setting regarding tenure and that although no explicit system may exist, such a system may exist in practice.[27]

In Greene v. Howard University,[28] the Court of Appeals looked at the usual practices of the University stating:

> Contracts are written, and are to be read by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a University is."[29]

It appears settled then, that specific contract provisions or policies providing for financial exigency as a cause for tenured faculty dismissals will be honored by the courts. In the absence of an explicit tenure provision, the courts will usually look beyond the written tenure contract and view financial exigency provisions which conform with institution handbook policies and the practices of the particular institution. Finally, the practices of institutions of higher education as a whole may be scrutinized by the courts in determining the authority of an institution to dismiss tenured faculty due to financial exigency.

PUBLIC INSTITUTIONS

Public institutions of higher education are governed not only by the contractual obligations discussed above, but also by the constitutional mandates of the Fourteenth Amendment.[30] The Fourteenth Amendment protects citizens against state intrusions of their property interests without due process of law. Public colleges and universities, acting as agents of the state, are therefore limited by the Fourteenth Amendment. This property interest is present if:

> There are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown.[31]

Johnson v. Board of Regents of University of Wisconsin System[32] presents a detailed study of due process requirements necessary for tenured faculty dismissals. In Johnson, the University system was faced with state budget cuts of 2.5% in the base budget as well as reduced enrollments on several

of the University of Wisconsin campuses. As a result of the financial hardship, University system officials concluded that some tenured faculty members would have to be dismissed. The chancellor of each campus was responsible for determining how the reduction of funds would effect his respective campus. Based on the chancellors' decisions, each plaintiff received a written termination notice.

At the time of these decisions, the University could statutorily dismiss tenured faculty only for cause. Since financial exigency was not a statutory reason for dismissal, the Regents changed the faculty status to "lay-off" and instituted "reconsideration procedures" for affected faculty members. These procedures were limited to:

> (a) whether there is sufficient evidence to support the decision to lay-off and/or (b) whether there have been material deviations from the procedure established by the President and Chancellor relating to determination of fiscal and programmatic needs of the University. [33]

The review committee, specifically composed of persons who were not a part of the original dismissal decision, was to report its recommendation to the chancellor who then had the final decision. As part of these procedures, the faculty members were to be told the basis for their particular dismissal, were to be afforded access to university documents used in the decision, and were to shoulder the responsibility of convincing the committee that the decision could not be sustained.

In response to the plaintiffs' due process claims, the judge in Johnson stated that despite the desirability of having tenured faculty involved in all the decision-making stages involving budget cuts and faculty dismissals, the Fourteenth Amendment did not demand such participation. Any due process claim of the faculty would necessarily be decided subsequent to the faculty receiving notices of dismissal. After the notice had been received, affected faculty had to be afforded a fair opportunity to show:

(1) that the true reason for his or her lay-off was a constitutionally impermissible reason; or (2) that, given the claim of decisions which preceded the ultimate decision designating him or her by name for lay-off, that ultimate decision was nevertheless wholly arbitrary and unreasonable.[34] In order to ensure a fair opportunity to make such a showing, these minimal procedures were suggested:

> furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;
>
> furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
>
> making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
>
> providing each plaintiff the opportunity to respond. [35]

The judge in Johnson determined that the procedures afforded the plaintiffs were sufficient to fulfill these due process requirements. The disclosures to the plaintiffs and the opportunity to respond was sufficient enough to cause a denial of the requested preliminary injunction against the Board of Regents.

In Levitt v. Board of Trustees of Nebraska State Colleges,[36] legislative budget reductions necessitated dismissals of tenured faculty members at Peru State College. The College President, along with College Deans, prepared a list of 16 criteria on which to judge the faculty members in order to decide which members would be terminated. Using these criteria as well as the welfare of the overall educational program as a basis for their decisions, the administrators decided on the particular faculty to be dismissed.

The court in Levitt found the use of such objective criteria as well as the absence of any characterization of the terminated faculty as incompetent to be persuasive in its decision holding that the Board afforded adequate due process to the dismissed faculty:

> . . . certainly it was peculiarly within the province of the school administration to determine which teachers should be released, and which retained. . .
>
> These principles indicate that the process used in the instant case to determine the termination was fair and reasonable and did not deprive the plaintiffs of any of their constitutional rights. [37]

Furthermore, the court stated the dismissal itself did not in any way place a stigma upon the professional reputation of the plaintiffs, and therefore, did not disclose future employment possibilities.[38]

Brenna v. Southern Colorado State College[39] supports the tenet that a college need not employ any particular selection process in choosing faculty to dismiss, so long as the process is reasonable. In Brenna, a tenured faculty member was dismissed due to the financial exigency of the college. The decision was made despite the fact that a nontenured professor in the same department was retained. Since the decision was made to meet the needs of the department, was based on substantial evidence, and was made in good faith, the Court of Appeals held that the plaintiff had been afforded adequate due process. [40]

Public institutions, then, are bound not only by their contractual tenure obligations, as are private institutions, but also are governed by the Fourteenth Amendment. To fulfill this constitutional requirement, public colleges and universities need to provide the dismissed faculty written notice of the dismissal and an adequate opportunity to be heard. The particular elements comprising an adequate opportunity to be heard will be dependent upon the particular facts of each case. However, the guidelines set out by the judge in Johnson would appear to afford adequate due process to the affected faculty member.[41] This hearing apparently needs to be prior to actual termination, but need not be prior to the selection of the particular faculty member to be dismissed. Finally, as long as the basis

for selecting the particular faculty members to be dismissed is reasonable, the courts will not require one selection process over another.

WHAT CONSTITUTES FINANCIAL EXIGENCY

The 1976 AAUP RIR defined financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."[42] This "survival standard" seems to indicate two ideas: (1) the institution would be in a state of closing if tenured faculty were not dismissed; and (2) that other remedial measures must be instituted prior to dismissing tenured faculty.[43] Despite the existence of the survival standard promulgated by the AAUP, the courts have not followed this definition of financial exigency. Furthermore, the courts seem willing to give great deference to the discretionary judgment of a College Board of Trustees in assessing the reasonableness of a state of financial exigency.[44]

In Bloomfield, the following facts were presented to the court. From 1972 to 1974, the cash deficit of the college had risen from $123,000 to $231,000, the 1973 operating deficit was $368,000, the college endowment fund declined 21% in 1973, and the college bank was lending money on a week-to-week basis and only to meet the payroll.[45] However, the college did have a piece of property with a market value between five million and seven million dollars. The court viewed the fact that this property was not producing income and that its sale would produce enough money to meet any immediate and foreseeable financial requirements of the college, to be determinative in its decision against the existence of a state of financial exigency. Viewing the financial problem as one of liquidity, the court stated: "the sale of the Knoll as an available alternative to the abrogation of tenure is a viable one and fairly to be considered on the meritorious issues."[46]

Although affirming the trial courts' decision to reinstate the plaintiff faculty member, the Court of Appeals disagreed with the decision that a state of financial exigency was not present.[47] The appellate court found the trial court's interpretation of financial exigency to be "too narrow a concept of the term in relation to the subject matter involved. A more reasonable construction might be encompassed within the phrase 'state of urgency'." [48] The trial court judge was held to be incorrect in basing his conclusion of the absence of a state of financial exigency upon the failure of the college to sell its property. The appellate court further stated, "the emphasis upon the alternate use of this capital asset by the trial judge in reaching his conclusion that a financial exigency did not exist was unwarranted and should not have been the basis of decision." [49]

A similar decision was rendered in Krotkoff. On appeal, the plaintiff argued that the jury was entitled to determine whether the college trustees had acted reasonably by failing to secure judicial permission to invest the endowment and by not selling land which was being held for a better price. The Court of Appeals, relying on the Bloomfield decision, held that the principle in Bloomfield should also apply to the dissipation of the endowment. The court further stated, "The existence of financial exigency should be determined by the adequacy of the college's operating funds rather than its capital assets." [50]

Financial exigency in a department or a college of an institution rather than the institution as a whole has been held sufficient to terminate tenured faculty members. In Scheuer v. Creighton University,[51] the plaintiff was dismissed when the university determined that a state of financial exigency existed in its Pharmacy College. The Nebraska Supreme Court, relying on language in the faculty handbook as well as a lack of supporting cases, disregarded the 1976 RIR definition of financial exigency as "an imminent

financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."[52] The court felt that the plaintiff's interpretation of financial exigency would require the college to continue operating until the financial crisis of one school spread throughout the university, resulting in the closing of the entire institution. The court stated, "we specifically hold the term 'financial exigency' as used in the contract of employment herein may be limited to a financial exigency in a department or college."[53]

Other examples of judicially accepted instances of financial exigency include the following: legislative budget reductions resulting in reduced number of faculty and legislation mandating a 2.5% budget reduction in addition to reduced enrollment.[54]

Although each situation must be judged on the individual facts presented, the cases do present some insight into a definition of financial exigency. Apparently, the courts are not willing to adopt the "survival standard" as set forth by the AAUP. The courts seem to look at the operating expenses of an institution, but they reject the contention that capital assets need to be invaded to alleviate existing financial problems. This judicial definition allows an institution to take necessary measures to reduce the financial hardship before the situation becomes irreversible.[55] Also, the financial hardship may be limited to a department or a college of the institution rather than affecting the institution as a whole. Finally, once a governing body has declared that a state of financial exigency exists, the court will allow much deference to that discretionary decision in the absence of facts indicating a totally unreasonable or capricious decision.

BONA FIDE DISMISSALS

Although not accepting the AAUP "survival standard" definition of financial exigency, the courts have accepted the AAUP position that dismissals of tenured faculty due to financial exigency must be demonstrably bona fide. This requirement of good faith may be defined as follows:

> Where there is a showing that the administrative body in exercising its judgment, acts from honest conviction, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.[56]

This requirement of good faith has three elements. The evidence must demonstrate that (1) the dismissals were a measure reasonably calculated to alleviate the institution's financial exigency; (2) that the institution uniformly used reasonably objective criteria in determining which specific, individual faculty were to be dismissed; and (3) that the college made a reasonable effort to provide alternate employment to the faculty dismissed.[57]

Bloomfield College presented a case of bad faith, non-bona fide dismissals of tenured faculty. In June, 1973, the Board of Trustees, adopting Resolution R-58, dismissed thirteen faculty members and notified the remaining faculty that all contracts were to be one-year terminable contracts. These actions of the Board were in response to what was perceived as a financial crisis at the college. However, within the next few months, the college hired twelve new untenured faculty members under new program innovations for the overall rehabilitation of the institution. The dismissed faculty were considered unfit for this new innovation and were not considered for rehiring. This new direction decision, however, was not made until the fall of 1973, several months after the adoption of Resolution R-58 and the filing of the plaintiff's suit.

At issue in Bloomfield was whether or not the dismissal of the tenured faculty was bona fide. The Board was found to have failed to demonstrate by a preponderance of the evidence that the actions taken were good faith related to a condition of financial exigency within the institution. The court stated the following reasons for the finding of bad faith.

> 1) There was no suggestion of how the college could have similarly benefited by placing the entire faculty on one-year terminal contracts. The court found no immediate financial benefit and could only interpret the actions "as a calculated repudiation of a contractual duty without any semblance of legal justification."
> 2) The hiring of twelve new faculty members was not justified by a showing of "extraordinary circumstances" as required by the college policies. The new program objectives which facilitated the new hirings were unclear and the program was adopted at a time subsequent to the lawsuit.
> 3) Testimony of an expert witness that the standard practice was to involve a maximum amount of faculty participation in these decisions also aided the court in its decision. The purpose of this faculty involvement was to insure sound professional judgment that the long-term goals of the college would be fulfilled. The court found such faculty participation to be lacking in this instance.
> 4) Finally, the court cited the absence of other remedial measures such as across-the-board salary reductions for all faculty or reduction of faculty size by nonrenewal of contracts of faculty on probationary status as evidence of bad-faith on the part of the Board.[58]

An example of a good-faith bona fide dismissal of a tenured faculty member is presented by Krotkoff v. Goucher College.[59] In order to alleviate the College's heavy financial burdens, the Board of Trustees sought a more aggressive investment policy toward its assets, froze salaries, cut administrative and clerical staffs, and deferred maintenance. In addition, an administrative suggestion to eliminate the classics and German sections of the language department was instituted. As a result, the plaintiff, a tenured faculty member , was not rehired; but another less experienced instructor of German was retained. The College sent the plaintiff Krotkoff a list of available positions for the following year. Although she expressed an interest in a position in the Economics Department, her transfer was declined due to the

fact that she would need two to four years of training to become qualified.

In order to determine whether or not the dismissal of Krotkoff was bona fide, the court determined her rights under the faculty contract. Viewing the evidence most favorably to the faculty member, the court held that she was entitled to insist (a) that the College use reasonable standards in selecting which faculty appointments to terminate, and (b) that it take reasonable measures to afford her alternative employment.[60] These procedures were determined to be a part of the academic community's understanding concerning tenure.[61]

The court further held that the College did not breach its contract with Krotkoff by failing to rehire her while retaining another less experienced tenured faculty member. In addition, absent a special contractual provision, the College was not obligated to retain Krotkoff by demoting the other instructor to part-time status.[62]

In answer to the plaintiff's contention that the College had a duty to retrain her for another position, the court ruled that the College was under no duty to train a tenured faculty member for appointment in another discipline. Noting that the plaintiff expressly stated that any alternate position had to carry the same tenure, rank, and salary level of her terminated position, the court found no error in the action of the Economics Chairman in declining her transfer.

> No evidence suggested that the head of that department or the president acted unreasonably in assessing the time and expense of retraining Krotkoff for the position or in deciding that her transfer would not be feasible.[63]

Bloomfield and Goucher College establish a theory of "objective bad-faith" if the evidence shows that (1) the dismissal is not a measure reasonably calculated to alleviate the financial exigency, or (2) that standards used in determining which faculty should be dismissed were not reasonable, or (3) that the standards were not fairly applied, or (4) that the institution

failed to make a reasonable effort to find and appoint the dismissed faculty member to another available position for which that member is academically qualified.[64]

CONCLUSION

Hopefully,this paper has made apparent the existence of the financial problems which institutions of higher education are presently facing and will continue to face in the future. The numerous examples provided of such institutions in financial trouble should emphasize the reality of the situation.

As a result of the increasing financial burdens, the administrators of higher education institutions are being faced with the prospect of having to dismiss tenured faculty members. In order to develop fair and legally adequate procedures for dismissal, the administrator needs to have a working knowledge of the case law in this area. Although not needing to be a legal expert or have lawyer-like expertise, administrators should be familiar with the cases and the general principles contained in these cases. This paper has provided the administrator with this working knowledege, whether a public or a private institution is involved.

With this knowledge at hand for the administrator, he/she will be able to develop guidelines for dismissals of tenured faculty members. Development of such guidelines with the discussed principles in mind may reduce the chances for future litigation involving tenured faculty members. Although fairness to the dismissed faculty member is an important element of any developed guidelines, this reduction of litigation is also a very practical goal in the preparation of guidelines. The guidelines to follow will provide a basis upon which the administrator may base the development of procedures at his/her particular institution.

GUIDELINES

The following administrative guidelines have been derived from the judicial holdings and legal principles set forth from the cases discussed. Although many of these guidelines have been developed from the constitutional requirements necessary in a public institutional setting, these guidelines also set forth procedures which would be applicable in a private college or university. Obviously, any guidelines must be tailored to meet the particular needs of each institution, however, the guidelines presented should have general applications to most institutions.

PRIOR ACTIONS

1) In planning the overall policies and strategies of the institution in financial exigency situations, the administrator should ensure that careful documentation of any planning meetings has been prepared.

2) Although not constitutionally required, the administrator may consider having faculty representatives participate in sessions dealing with financial exigency planning. This participation will aid in the development of fair dismissal procedures and provide evidence of good-faith on the part of the administration.

3) Other remedial steps should be considered and implemented prior to dismissals of tenured faculty,

i) Such preliminary steps may include wage freezes, reduction of clerical staff, reduction of maintenance support, reduction of nonessential services, dismissal of part time and non-tenured faculty.

ii) If such remedial steps are instituted, these actions should be carefully documented as well as the expected benefit that these reductions will have for the institution.

4) If guidelines and procedures dealing with tenured faculty dismissals due to financial exigency are developed, the administrator must ensure that the guidelines are applied equally to all affected faculty members.

5) Consultation with department heads concerning their evaluations of faculty members should also be considered in the decision to dismiss tenured faculty members.

6) Any course of action which is chosen should be in furtherance of the goals and educational mission of the institution.

7) University counsel should always be involved in these procedural developments. Having legal advice at every step of the financial exigency planning procedures is essential.

TENURE CONTRACT

1) A written definition of financial exigency should be explicitly stated in the employment contract.
2) Procedures to be followed in financial exigency dismissal situations should also be specified in the contract.
3) A written description of the rights which are to be afforded to the faculty when dismissals due to financial exigency occur should be specified in the contract as well.

NOTICE OF DISMISSAL

1) A written letter notifying the tenured faculty member of his/her dismissal should be sent to the faculty member(30 days prior to the termination date has been held to be sufficient).
2) This notice should explicitly state that the financial exigency of the institution is the reason for the dismissal.
3) The notice should also explain the basis upon which the decision to dismiss the particular faculty member involved was made.
4) The faculty member should be notified that he/she will be provided an opportunity to have his/her case reviewed before a final decision is made.
5) The faculty member should be notified that the information and data upon which the decision of his/her dismissal was based will be made available upon request.
6) The notice should specify the date and location of the review hearing, the issues to be reviewed, and the procedural rights which the faculty member may have available to him/her.

REVIEW HEARING

1) The date of the review hearing should be set so as to allow the faculty member sufficient time to prepare his/ her case(30-90 days after notice of dismissal, for example).
2) The faculty member should be allowed to show that the dismissal was in error because a) there was no actual state of financial exigency at the institution or 2) that the dismissal was in fact due to the faculty member's exercise of a constitutional right.
3) The faculty member should also be allowed to show that the institution deviated from its own guidelined in making the decision to dismiss the particular faculty member involved.
4) Members of the review panel should not also have been members of the original body which made the decision to dismiss.
5) Information concerning the decision of the existence of a state of financial exigency of the institution need not be provided to the faculty member.

SUBSEQUENT ACTIONS

1) New tenured faculty members should not be hired to replace the positions of those faculty who were dismissed because of financial exigency. New faculty members may be hired if the administrator can show that the dismissed faculty members are not qualified for the new positions or that the goals and educational mission of the institution will suffer without the presence of the new faculty (Periods of two to three years are suggested in which new faculty should not be hired).

2) The dismissed faculty should be afforded the right of first refusal for new positions in their department before new faculty are hired.

3) The administrator should attempt to place the affected faculty members in different positions for which those faculty are qualified.

4) This duty to place faculty in different positions does not carry a duty to retrain the faculty for different positions.

FOOTNOTES

[1]Wayne R. Kirschling, "Public Policy in an Uncertain Future," New Directions for Institutional Research: Coping With Faculty Reduction, ed. Stephen R. Hamper(Jossey-Bass, inc, 1981), p. 4.

[2]Kent G. Alm, Elwood B. Ehrle, and Bill R. Webster,"Managing Faculty Reductions," 48 Journal of Higher Education 153,154-55(March-April, 1977).

[3]Larry L. Leslie, "Financial Prospects for Higher Education in the 1980's," 51 Journal of Higher Education 1,2 (1980).

[4]The Chronicle of Higher Education, September 25, 1978, vol. 17, no.4, p. 5.

[5]The Chronicle of Higher Education, October 9, 1979, vol. 19, no. 6, p. 1.

[6]The Chronicle of Higher Education, July 23, 1979, vol. 18, no. 20, p. 4.

[7]The Chronicle of Higher Education, April 13, 1981, vol. 22, no. 8, p. 1.

[8]Id. at 8.

[9]The Chronicle of Higher Education, September 30, 1981, vol. 23, no. 5, p. 1.

[10]Id. at 10.

[11]John Andrew Gray, "Higher Education Litigation: Financial Exigency," 14 University of San Francisco Law Review 375(Spring, 1980); see, "Financial Exigency As Cause For Termination Of Tenured Faculty Members In Private Post Secondary Educational Institutions," 62 Iowa Law Review 481 (1976), for a detailed discussion of the development of the tenure system in the United States.

[12]Browzin v. Catholic University, 527 F. 2d 843,846(D.C. Cir. 1975).

[13]"Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments," 60 AAUP Bulletin 269,270(1974).

[14]129 N.J. Super 249,322 A. 2d 846(1974), aff'd. 136 N.J. Super 442, 346 A. 2d 615(1975).

[15]129 N.J. Super.at 253, 322 A. 2d at 848.

[16]60 AAUP, supra, at 270.

[17]Robert M. Hendrickson, "Legal Aspects of Faculty Reduction," New Directions for Institutional Research: Coping With Faculty Reduction, ed. Stephen R. Hamper(Jossey-Bass, Inc., 1981), p. 28.

[18]527 F. 2d 843 (1975).

[19]62 Iowa Law Review, supra, at 509.

[20]Hendrickson, supra, at 28.

[21]585 F. 2d 675 (4th Cir. 1978).

[22]585 F. 2d at 680,682.

[23]585 F. 2d at 678.

[24]585 F. 2d at 679-80.

[25]62 Iowa Law Review, supra, at 509.

[26]408 U.S. 593 (1972).

[27]408 U.S. at 602-03, See also, Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 (1972).

[28]271 F. Supp. 609 (1967), remanded 412 F. 2d 1128 (D.C. Cir. 1969).

[29]412 F. 2d at 1135.

[30]U.S. Const. Amend. XIV, "...No state shall make or enforce any law which..., nor shall any state deprive any person of life, liberty, or property without due process of law,..."

[31]408 U.S. at 601, quoting in part from Roth.

[32]377 F. Supp. 227(1974), aff'd. 510 F. 2d 975 (1975). See, University Of Alaska v. Chauvin, 521 P. 2d 1234 (1974), Bignall v. North Idaho College, 538 F. 2d 243 (9th Cir. 1976), Klein v. Board Of Higher Ed. Of City Of New York, 434 F. Supp. 1113 (1977), for more cases dealin with dismissals of tenured faculty because of financial exigency.

[33]377 F. Supp. 227 (1974), aff'd. 510 F. 2d 975 (1975).

[34]377 F. Supp. at 240.

[35]Id.

[36]376 F. Supp. 945 (1974).

[37]376 F. Supp. at 950.

[38]376 F. Supp. at 951-52.

[39]589 F. 2d 475 (10th Cir. 1978).

[40]589 F. 2d at 477-78.

[41] See, supra, note, 35.

[42] "1976 Recommended Institutional Regulations on Academic Freedom and Tenure," 62 AAUP Bulletin 184,186 (1976).

[43] Gray, supra, at 381.

[44] Id.

[45] 192 N.J. Super. at 257-58, 322 A. 2d at 850-51.

[46] 129 N.J. Super. at 261, 322 A. 2d at 852.

[47] 126 N.J Super. 442, 346 A. 2d 615 (1975).

[48] 136 N.J. Super. at 446, 346 A. 2d at 617.

[49] 136 N.J. Super at 446-47, 346 A. 2d at 617.

[50] 585 F. 2d at 681.

[51] 199 Neb. 618, 260 N.W. 2d 595 (1977).

[52] 199 Neb. at 630, 260 N.W. 2d at 600, see, supra, note, 42.

[53] 199 Neb. at 631, 260 N.W. 2d at 601.

[54] Gray, supra, at 385.

[55] James L. Petersen, "The Dismissal of Tenured Faculty for Reasons of Financial Exigency," 51 Indiana Law Review 417,423 (1976).

[56] 376 F. Supp. at 950.

[57] Gray, supra, at 388.

[58] 129 N.J. Super at 268-72, 322 A. 2d at 856-58.

[59] 585 F. 2d 675 (4th Circuit 1978).

[60] 585 F. 2d at 682.

[61] Id.

[62] Id. at 682.

[63] 585 F. 2d at 683.

[64] Gray, supra, at 396.